Salchi SPA v Ler Cheng Chye

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-490 OF 1997
KAMALANATHAN RATNAM J
14 MAY 1999

Civil Procedure *— Summary judgment — Arguable issues — Public interest consideration — Whether application for summary judgment should be allowed*

The learned deputy registrar dismissed the plaintiff's application for summary judgment. Both parties appealed. Several issues, were raised, inter alia: (i) the defendant did not raise defences touching on the cheques in issue; (ii) the guarantee in issue was void as the goods were not suitable for the Malaysian climate; and (iii) public interest consideration.

Held, dismissing the appeals with costs:

Having looked at the detailed facts of the case, there was some basis in the defendant's contentions; issues of which must be argued out at a full trial. Further, the court have to take into consideration the issue of national interests to ensure that there is fairness meted out. Foreign investors and genuine businessmen will only come if they are assured that the Malaysian courts would remain fair at all times (see p135A–F, 136D–E).

[Bahasa Malaysia summary

Timbalan pendaftar yang arif telah menolak permohonan plaintif-plaintif untuk penghakiman terus. Kedua-dua pihak telah merayu. Beberapa isu-isu telah dibangkitkan, antara lain: (i) defendan tidak membangkitkan pembelaan berkenaan dengan cek-cek yang berkenaan; (ii) jaminan yang menjadi isu adalah batal kerana barangan tersebut adalah tidak sesuai untuk keadaan di Malaysia; dan (iii) pertimbangan kepentingan awam.

Diputuskan, menolak rayuan-rayuan dengan kos:

Selepas melihat fakta-fakta kes dengan terperinci, terdapat dasar-dasar untuk penegasan defendan; terdapat isu-isu yang mesti dihujahkan di perbicaraan penuh. Selanjutnya, mahkamah juga terpaksa mengambil kira isu kepentingan awam untuk memastikan keadilan dicapai. Pelabur-pelabur asing dan juga para peniaga hanya akan datang jika mereka yakin bahawa mahkamah Malaysia akan kekal adil sepanjang masa (lihat ms 135A–F, 136D–E).]

Notes

For cases on arguable issues, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4452–4453.

Cases referred to

Development & Commercial Bank Bhd v Brimal Sdn Bhd (Syarikat Oriental Elastic Industries, third party) [1991] 3 MLJ 187 (refd)

Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 Lloyd's Rep 463 (refd)

Tay Swee Sen v Goh Chio Tee [1990] 1 MLJ 223 (refd)

K Giok (Malik & Partners) for the plaintiff.

Ranjan Chandran (Iza Ng Yeoh & Kit) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J: On 17 November 1998, the learned Deputy Registrar ('DR') dismissed the plaintiff's application for summary judgment and gave leave to the defendant to defend the action conditional upon payment of the sum of RM300,000 into court on or before 18 December 1998. The DR further ordered that should the defendant fail to pay the aforesaid sum into court, the plaintiff should be at liberty to enter judgment for the amount prayed for in its application.

The plaintiff has appealed against the DR's decision in respect of the application for summary judgment. So has the defendant.

Facts

The facts are that two cheques were given by the defendant to the plaintiff. The first cheque was given as a 50% deposit for the first shipment of goods to Italia Coatings Sdn Bhd ('ICSB') which is not a party to these proceedings. The exact invoiced value is to be mutually agreed upon by the plaintiff and ICSB in due course as stated in a letter dated 15 July 1996 from the plaintiff to the defendant. The letter further states that the plaintiff will not present the cheque for clearance unless the plaintiff notifies the defendant at least 21 days in advance to exchange payment direct from ICSB. The defendant stopped payment of the cheque as he alleges that ICSB had already made full payment for the goods shipped.

The second cheque was given as a guarantee against two containers which would be sent to ICSB. In a letter dated 9 October 1996, the plaintiff and the defendant agreed that 'any products in the containers which are not suitable for the Malaysian market will be credited 100% to ICSB and the cheque will not be presented and the guarantee will be void.' The letter further stated that that 'On agreeing that the products are ok for sale, ICSB will open a L/C irrevocable confirmed 60 days or will make a direct payment to Salchi.'

The goods were shipped in October 1996 and the defendant says that the goods were unsuitable for the Malaysian climate. That being the case, the defendant says the guarantee is void and he was justified in stopping payment.

Both parties had sent in written submissions for their respective appeals and on 1 April 1999, I had dismissed both appeals and now give my reasons for doing so.

Whether the plaintiff is entitled to summary judgment on the cheques dishonoured

The plaintiff's claim against the defendant had from the outset been based on the dishonouring of two cheques for the sum of RM150,000 each. The plaintiff's submission is that the defendant must raise defences touching on the cheques. In the absence of that, the plaintiff is entitled to summary judgment for the sum claimed. The plaintiff cited two cases, that is, *Tay Swee Sen v Goh Chio Tee* [1990] 1 MLJ 223 and *Development & Commercial Bank Bhd v Brimal Sdn Bhd (Syarikat Oriental Elastic Industries, third party)* [1991] 3 MLJ 187 to support his contention. The plaintiff also referred to the book *Laws of Negotiable Instruments* (3rd Ed) by Poh Chu Chai. At p 194 of the book, the learned author referred to a House of Lords decision and stated as follows:

> When an action is brought on a bill of exchange by an immediate party to the bill, leave to defend the claim will only be granted if the bill is affected with fraud, illegality or failure of consideration.

This was decided in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 Lloyd's Rep 463 at p 469. Viscount Dilhorne held as follows:

> Bearing in mind the intrinsic nature of a bill of exchange, 'an unconditional order' which the appellants were entitled to regard as a deferred instalment of cash, and the fact that cross-claims, unless based on fraud, invalidity or failure of consideration are not allowed, it appears to me that seldom, if ever, can it be right while denying the right to bring a cross-claim, to allow a cross-claim to operate as a bar to execution and to prevent the holder of a bill of exchange receiving the deferred instalment of cash which the parties agreed he should get.

Based on this passage, I find that I cannot allow the plaintiff's appeal. Even though there is no cross-claim in this case, the defendant says that there is failure of consideration and illegality. Having looked at the detailed facts of the case which I shall further enumerate in due course I find that there may be some basis in the defendant's contention and hence the dismissal of the plaintiff's appeal.

Whether there had been full payment made by ICSB

The defendant's stand is that he had stopped payment of the first cheque because the price of the four containers had been settled by ICSB. The sum of RM150,000 had been paid by ICSB and that is the sum stated in the Debit Advice. However, there is a letter dated 21 March 1997 from the defendant to the plaintiff in response of the plaintiff's demand for payment of the balance of RM150,000 on 13 March 97. The defendant's reply is that he had 'stopped payment on my personal cheques issued to Salchi SPA and await the outcome of the resolution of the disputes and claims between the companies', which were technical matters on the products. The defendant did not categorically state that full payment had been made and that therefore there was no further payment due to the plaintiff. I therefore find that the contemporaneous documents showed that the defendant is far from candid in his defence.

Whether the guarantee is void

As for the second cheque, the defendant's stand is that the guarantee is void as the goods were not suitable for the Malaysian climate. There is a letter dated 29 January 1997 from ICSB to the plaintiff complaining about the point that most Salchi products were unable to substitute ILVA products. However, in that very same letter in item 3 of 'Outstanding Issues to be answered', and again in another letter also dated 29 January 1997 in the first paragraph, ICSB complained that the plaintiff had failed to 'proceed with the Buffer Stock in Port Klang'. If 100% of the plaintiff's products were unsuitable for the Malaysian climate, thus rendering the guarantee void then there would be no necessity whatsoever to have a Buffer Stock in Port Klang to attract more customers. ICSB did make some complaints about some of the products delivered by the plaintiff to ICSB but there was no evidence to show a 100% rejection, thus rendering the whole guarantee void. I am of the view that there ought to be a trial on this issue.

Public policy issues to be taken in account

In coming to the decision I did, I had taken into consideration the issue of public policy as urged by the defendant. The public policy I am referring to is that of national interests. The court must always ensure that there is fairness meted out. Foreign investors and genuine businessmen are encouraged to come to our country to boost our country's economy. They will only come if they are assured that the Malaysian courts would remain fair at all times. If indeed the goods delivered are worth RM300,000, then the Court must rule in favour of the plaintiff and order the defendant to make the payment due. If however, there had been a *joint* attempt by *both* parties to deprive the Government of its right to collect revenue through the customs and excise duties, then the loss must lie where it falls. The plaintiff's contention is that any customs duties payable, if any, would be borne by ICSB and not the plaintiff. There is no evidence adduced by the defendant that there are customs duties payable on the additional value of RM150,000 or on the original sums in the proforma invoices. This is a point that must be argued out at a full trial.

Affirmation of DR's decision

The facts, being as they are, I am of the view that ICSB had received goods worth RM300,000 and is now trying to use the defence of assumed illegality to escape from paying the balance due and they cannot be allowed to do so and neither can the defendant who is actually the owner and managing director of ICSB. This fact was also not disclosed by the defendant in any of its affidavit but was gleaned by the court from one of the exhibits filed as 'LCC-8' in encl 16. By allowing the defendant conditional leave to defend his case, I believe there will be instilled in the business community a confidence and willingness to trade with Malaysian businessmen and this will create a stronger economy. There will also be adherence to Malaysian laws by foreign businessmen wanting to trade here.

A I therefore affirmed the DR's decision dated 17 November 1998. I dismissed the plaintiff's appeal with costs and I also dismiss the defendant's appeal with costs. The stay order given on 17 December 1998 against the DR's decision is uplifted. The defendant is to effect payment within 14 days from the date hereof.

B *Appeals dismissed with costs.*

Reported by Loo Lai Mee

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